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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1972

No. 72-125

OTHA G. REE, JR., and LOCKHEED SHIPBUILDING AND CONSTRUCTON COMPANY,

Petitioners,

vs.

MUNICIPAL COURT OF THE LOS ANGELES JUDICIAL DISTRICT, COUNTY OF LOS ANGELES,

and

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondents.

Petition for a Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District.

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vs.

MUNICIPAL COURT OF THE LOS ANGELES JUDICIAL DISTRICT, COUNTY OF LOS ANGELES,

and

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondents.

Petition for a Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District.

Petitioners, Otha G. Ree, and Lockheed Shipbuilding and Construction Company, respectfully pray that a writ of certiorari issue to review the final order of the Court of Appeal of the State of California Second Appellate District entered May 23, 1972 denying a petition for a writ of prohibition.

Opinions Below.

There were no opinions by the state courts below. In each instance, the petitions filed by petitioners were denied without opinion by the appellate courts of California. Neither the order of the California Court of Appeal denying the petition for a writ of prohibition, nor the order of the California Supreme Court denying the petition for a hearing is officially reported, and each is attached hereto in Appendix A.

Jurisdiction.

The final order of the California Court of Appeal was entered on May 23, 1972. A timely petition for a hearing to the California Supreme Court was denied by that court on June 29, 1972. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

Question Presented.

Whether petitioners' successive criminal prosecutions on charges of maintaining an unsafe place of employment at the same location on July 16, 1971 and on June 22, 23, and 24, 1971, deprive petitioners of liberty and property without due process of law in violation of Section I of the Fourteenth Amendment to the United States Constitution, when all facts necessary to filing the second prosecution arose out of the same nucleus of facts as in the first prosecution and were known to the State prior to the filing of the first prosecution, each prosecution alleges violations of the same or similar statutes, and all charges could have been joined without prejudice to the State or to petitioners?

Constitutional Provision Involved.

Section I of the Fourteenth Amendment to the United States Constitution reads as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property; without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statutes Involved.

The relevant sections of the California Labor Code are as follows:

> "Section 6400. *Safe employment and place of employment*
>
> "Every employer shall furnish employment and a place of employment which are safe for the employees therein."
>
> "Section 6401. *Safety devices and safeguards*
>
> "Every employer shall furnish and use safety devices and safeguards, and shall adopt and use practices, means, methods, operations, and processes which are reasonably adequate to render such employment and place of employment safe. Every employer shall do every other thing reasonably necessary to protect the life and safety of employees."

"Section 6402. *Employee in unsafe employment or place*

"No employer shall require, or permit any employee to go or be in any employment or place of employment which is not safe."

"Section 6404. *Occupancy or maintenance of unsafe place*

"No employer shall occupy or maintain any place of employment that is not safe."

"Section 6414. *Misdemeanors; prima facie evidence of violation; burden of proof of compliance*

"Except where another penalty is specifically provided, every person is guilty of a misdemeanor who does any of the following:

"(a) Violates any safety provision or part thereof in, or authorized by, this part.

"(b) Fails or refuses to comply with any such safety provision or any part thereof.

"(c) Directly or indirectly, knowingly induces another so to do."

* * *

"Section 6416. *Death from employer's gross negligence; punishment*

"Every employer who, through his gross negligence in failing to provide a safe employment and place of employment, causes the death of his employee is punishable by imprisonment in the county jail for not more than one year or by a fine of not less than one thousand dollars ($1,000) nor more than five thousand dollars ($5,000)."

Statement of the Case.

Petitioner Lockheed Shipbuilding and Construction Company ("Lockheed") was at all times relevant hereto in charge of excavating and constructing the Sylmar tunnel project in the San Fernando Valley pursuant to a contract with the Metropolitan Water District of Southern California. Petitioner Ree was employed by Lockheed as Project and Safety Engineer.

On June 23, 1971, there occurred a flash fire within the tunnel which resulted in several injuries, and on June 24, 1971, there occurred an explosion within the tunnel which resulted in 17 deaths and several injuries. On June 27, 1971, the State Division of Industrial Safety (hereinafter the "Division") declared the tunnel to be an unsafe place of employment. From June 24, 1971, to and including July 16, 1971, Lockheed personnel and Division personnel conducted rescue, recovery, repair and maintenance operations in the tunnel.

On or about June 27, 1971, the Division commenced an investigation into the cause of the explosion. On August 30, 1971, by letter to Roger Arnebergh, Los Angeles City Attorney, the Division requested prosecution of petitioners for Labor Code offenses which were allegedly committed on June 23 and 24, 1971. (App. B at 3.) On August 30, 1971, the Division also transmitted its investigatory file to the City Attorney. The file included statements from all key witnesses to the events preceding the explosion. (Affidavit of Don H. Terry, App. B at 11.)

On September 2, 3 and 24, 1971, a representative of the City Attorney attended California State Assembly hearings on the subject of the Sylmar tunnel dis-

aster. Those hearings elicited extensive testimony regarding the events surrounding the Sylmar tunnel disaster, including an entry into the tunnel by Lockheed personnel and a police officer on July 16, 1971.*

On November 21, 1971, almost five months after the tunnel disaster, a misdemeanor complaint was filed entitled *The People of the State of California v. Lockheed Shipbuilding and Construction Company and Otha G. Ree, Jr.*, No. 402085, hereinafter referred to as the "first prosecution." The complaint did not, as was previously requested by the Division in its letter, seek to prosecute for Labor Code offenses allegedly committed on June 23 and 24, 1971. Instead the complaint alleged that on July 16, 1971, petitioners Ree and Lockheed furnished employment and a place of employment which were unsafe for employees (Labor Code §6400); required an employee to go and be in an employment or place of employment which was not safe (Labor Code §6402); failed and neglected to do everything reasonably necessary to protect the life and safety of employees (Labor Code §6403); and occupied and maintained an unsafe place of employment (Labor Code §6404).

These allegations in the first prosecution were based upon the theory that petitioners permitted and required an employee to enter and work in the tunnel on July 16, 1971, at a time when the tunnel was unsafe due to the events of June 24, 1971. Specifically, the thrust of the State's case at trial was that the tunnel was unsafe on July 16, 1971 because the dangerous levels of gases and inadequate ventilation which were present

*A copy of the official transcript of those hearings is on file in respondent court.

at the time of the explosion on June 24, 1971, were likely to remain and reoccur, and because petitioners utilized insufficient rescue procedures and equipment. It was never asserted at trial that anything occurred after June 24, 1971, to make the tunnel any more unsafe than it was as of that date. On February 25, 1972, following a trial of four weeks' duration, all charges were resolved by either verdicts of acquittal or orders of dismissal.*

On March 30, 1972, a second complaint was filed entitled *The People of the State of California v. Lockheed Shipbuilding and Construction Company, et al.*, No. 413019, hereinafter referred to as the "second prosecution." This complaint in relevant part alleges that petitioner Lockheed on June 22, 23 and 24, 1971 and petitioner Ree on June 23 and 24, 1971, furnished employment and a place of employment which were unsafe (Labor Code §6400); failed to furnish safety devices and safeguards and to adopt and use practices, methods, and operations which were reasonably adequate to render the tunnel safe (Labor Code §6401); required employees to go and be in an unsafe employment or place of employment (Labor Code §6402); and occupied and maintained an unsafe place of employment (Labor Code §6404). The complaint also alleges that petitioners caused the deaths of 16 employees through their gross negligence in failing to provide a safe employment and place of employment on June 24, 1971 (Labor Code §6416).

---

*Violations of other sections of the Labor Code and of California Penal Code §135 (concealing evidence—the gas testing device used at the time of the explosion) were also alleged but are not relevant to the issues raised by this petition. Lockheed was convicted on the Penal Code §135 charge and is presently appealing this conviction.

Prior to the time of filing the complaint in the first prosecution, the State was aware of all the basic facts underlying each and every one of the charges subsequently brought in the second prosecution. The same or similar sections of the California Labor Code are involved in each prosecution. Also, pursuant to California Penal Code §954, the two prosecutions could have been joined without prejudice to either the State or petitioners.

The trial in the second prosecution which is currently scheduled to commence July 24, 1972, is estimated to last eight to ten weeks with testimony not expected to begin until August 1, 1972.

Presentation of the Federal Question Below.

On May, 8, 1972, respondent municipal court denied petitioners' various motions to dismiss which had been based on state statutory and decisional grounds and state and federal constitutional grounds.

On May 12, 1972 petitioners filed original proceedings in the Los Angeles Superior Court, No. C 29671, seeking a writ of prohibition to restrain respondent court from proceeding with the trial of the second prosecution. The federal question for which review by this Court is sought was stated therein as follows:

> "[I]t is petitioners' position that the actions of the People in this case in arbitrarily causing petitioners to undergo the expense and humiliation of two long and complex trials, involving closely connected facts, events and issues, when there was no justification for doing so is fundamentally unfair and constitutes a denial of due process." (Memorandum of Points and Authorities in Support of Petition for Writ of Prohibition at 2.)

On May 15, 1972 the petition was summarily denied.

On May 17, 1972, the date originally set for commencement of the trial in the second prosecution, petitioners sought a writ of prohibition in the California Court of Appeal, 2nd Civ. No. 40323, and raised in virtually identical language the federal question raised in the Superior Court.

On May 23, 1972, the California Court of Appeal denied the petition without opinion. Upon a petition for hearing being filed with the California Supreme Court, the petition for a writ of prohibition and accompanying memorandum of points and authorities in the California Court of Appeal raising the federal question hereinabove described automatically became the record and the brief before the California Supreme Court. With said record and brief before it, the California Supreme Court summarily denied the petition for hearing on June 29, 1972. Because the California Supreme Court's denial of a petition for hearing is discretionary, it is the California Court of Appeal to which this Court's writ of certiorari, if granted, should properly issue. See *Hammerstein v. Superior Court,* 341 U.S. 491 (1951).

Reasons for Granting the Writ.

Multiple prosecution of petitioners for offenses based on a common nucleus of facts under the circumstances of this case raises an important constitutional question under the Due Process Clause of the Fourteenth Amendment.

Requiring petitioners to undergo the expense and humiliation of two long and complex criminal trials, arising out of the same nucleus of facts and involving closely connected facts, events and issues, is fundamentally unfair and constitutes a denial of due process in violation of the Fourteenth Amendment of the United

States Constitution. Petitioners recognize that their second prosecution is not barred by the double jeopardy clause nor this Court's recent interpretation of the double jeopardy clause in *Ashe v. Swenson*, 397 U.S. 436 (1970) and did not urge that ground below. It is not petitioners' position that the second prosecution involves the "same offense" as did the first prosecution. However, the policies underpinning the double jeopardy clause, as well as other policy and practical considerations support the due process rule petitioners advance.*

Such a rule would require compulsory joinder in a single prosecution of all criminal offenses against an individual which are known to the prosecutor and are within his jurisdiction, if the offenses charged are based on the same conduct or course of conduct, or arise from the same criminal episode, or are based on the same nucleus of facts. The policy in support of this rule was stated by this Court in *Green v. United States*, 355 U.S. 184, 187-188 (1957), a double jeopardy case, as follows:

> "[T]he State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense,

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*It might be argued that in *Hoag v. New Jersey*, 356 U.S. 464 (1958), the Court held by a divided court, that multiple prosecutions of related offenses were not in violation of the due process clause of the Fourteenth Amendment in the facts of that case. (Warren, C. J.; Black, J. and Douglas, J. dissenting.) *Hoag* was overruled on its facts by *Ashe v. Swenson*, 397 U.S. 436 (1970) which held the doctrine of collateral estoppel to be embodied in the double jeopardy clause of the Fifth Amendment which was made enforceable against the states in *Benton v. Maryland*, 395 U.S. 784 (1969). Moreover, since this Court's decision in *Hoag*, notions of what constitutes fundamental fairness have expanded and changed, and events have occurred which indicate that the question of whether a rule of compulsory joinder of criminal offenses related in their commission by the same nucleus of facts, criminal episode or course of conduct is required by due proess, is ripe for consideration by this Court.

> thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity . . ."

Though originally written to apply to the "same offense," the concept articulated by this language applies equally to different offenses related in their commission by the same nucleus of facts, criminal episode, or course of conduct. *Cf.* the concurring opinion of Mr. Justice Brennan, *Ashe v. Swenson, supra,* at 448-460.

As noted in *Green, supra,* a criminal trial is an "ordeal." It is an ordeal for the defendant emotionally, mentally, and financially. In view of this, an individual charged with criminal offenses should have to endure as few criminal trials in his life as is reasonably possible. In cases where one trial would suffice, and in which all criminal charges outstanding against an individual arising out of the same nucleus of facts could be handled in that one trial without prejudice to the state or defendant, only one trial should be permitted. In addition to according defendants due process of law guaranteed them by the Fourteenth Amendment, such a rule would prevent the needless waste of court time, waste of public funds and needless repetition of evidence, which are now caused by a failure to join criminal offenses related in their commission as is evident in the instant case.* Such a compulsory joinder

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*Much of the lengthy proceedings and testimony which occurred in the first prosecution on many subjects and issues would be necessarily duplicated in the second prosecution. In the first prosecution much time and effort was involved in acquainting the court and jury with such matters as the physical layout, dimensions and appearance of the tunnel project, above ground as well as within the tunnel; the tunnel's electrical system; the communication methods and equipment; the tunnel's transportation system; the tunnel's ventilation system; the safety methods

(This footnote is continued on next page)

rule has been recommended by commentators, see *Carroway Pervasive Multiple Offense Problems—A Policy Analysis,* 1971 Utah L. Rev. 105, 117-19; and has been fashioned by English Courts from principles derived from the common law. *Connelly v. Director of Public Prosecutions,* [1964] A.C. 1254, 1359-60. A similar rule has also been recommended by the National Commission on Reform of Federal Criminal Laws in their *Study Draft of a New Federal Criminal Code* §703(2) (1970).

Further, the criminal case load at both the federal and state levels has continued to grow and become further burdened at an increasing rate. For example, in California alone, between the years 1965 and 1970, the number of criminal cases awaiting trial in the 16 largest counties nearly tripled. 1971 *Report of the Administrative Office of the California Courts,* pp. 100-126.

Moreover, the appropriateness of applying such a compulsory joinder rule in this case is further made apparent by the nature of the statutory scheme under which petitioners are being prosecuted. Each day's

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and equipment utilized; the construction methods and equipment used at the project; the personnel who worked at the project, including the identity, skills, duties, functions, schedules and authority of the various managers, engineers, supervisors, and construction employees; the personnel responsible for safety matters at the tunnel, including petitioners' employees and representatives of the Division, and the duties and authority of each; the gas meter which was used to detect dangerous levels of gas, including its physical appearance, method of operation, method of calibration after the flash fire of June 23, 1971, and immediately prior to the explosion of June 24, 1971, and the facts surrounding its subsequent recovery, custody, and testing; the relative safety of the project prior to the explosion of June 24, 1971, including the inspection trip made by Division representatives on June 23, 1971; and the physical appearance of the tunnel subsequent to the June 24, 1971 explosion.

continuance of any violation of the sections under which petitioners are charged constitutes a separate and distinct offense. California Labor Code §6415. For example, petitioners' second prosecution concerns the events of June 22, 23 and 24, 1971. The first prosecution concerned events at the same place of employment on June 16, 1971. Without adoption of a rule prescribing more equitable and ascertainable standards limiting the number of successive prosecutions, petitioners could have been subject to separate criminal trials for each of the intervening dates between the two prosecutions which have already been filed. The State in these subsequent prosecutions may argue, as it has below, that the conditions in the tunnel varied on each of those intervening dates—more or less gas or a different kind of gas could have been in the tunnel on those dates—thus precluding petitioners from effectively asserting the double jeopardy-collateral estoppel defense made available by *Ashe, supra.*

Certainly, the state should not be entitled to separate trials for each day of violation. Petitioners submit that the rule which is required by the due process clause, and which is most in accord with the fair and efficient administration of the Anglo-American system of criminal justice as it is presently constituted, is one limiting the number of criminal prosecutions brought against an individual to as few as is necessary. For petitioners to be required to endure two lengthy, duplicative, expensive and highly-publicized trials for the closely related charges arising out of the Sylmar tunnel explosion, when there is no good reason for doing so, is simply indefensible from a standpoint of either fundamental fairness or the sensible administration of criminal justice.

Conclusion.

For the foregoing reasons, it is urged that this petition for writ of certiorari be granted.

Respectfully submitted,

CHARLES G. BAKALY, JR.,
Attorney for Petitioners.

Of Counsel:

DON H. TERRY,
HOLLOPETER & TERRY,
RICHARD N. FISHER,
GORDON E. KRISCHER,
O'MELVENY & MYERS,

July 20, 1972.

APPENDIX A.

Order of the Court of Appeal.

In the Court of Appeal of the State of California, Second Appellate District, Division Four.

Lockheed Shipbuilding and Construction Company, et al., Petitioners, vs. Municipal Court, Respondent. Civil No. 40323.

Loren G. Savage, et al., Petitioners, vs. Municipal Court, Respondent. Civil No. 40331.

The People, Petitioners, vs. Municipal Court, Respondent. Civil No. 40347.

Filed: May 23, 1972.

THE COURT:

In each of the above entitled proceedings, the petition is denied.

To give petitioners the opportunity to petition the Supreme Court, the temporary stay of the trial in the case entitled People v. Lockheed Shipbuilding and Construction Company, et al., Los Angeles Municipal Court No. 413019 as ordered by this court on May 17, 1972, is continued in effect for 10 days from the date of this order unless sooner vacated by order of this court or of the Supreme Court.

Order Denying Hearing After Judgment by the Court of Appeal.

Order Due July 21, 1972.

In the Supreme Court of the State of California, in Bank. 2nd District, Division 4, Civil No. 40323, Civil No. 40331, Civil No. 40347.

Lockheed Shipbuilding & Construction Company Et Al. v. Municipal Court, Los Angeles Judicial District (And Companion Cases)

Petition for hearing DENIED.

McComb, J., is of the opinion that the petition should be granted.

Wright, Chief Justice

Filed June 29, 1972.

APPENDIX B.

Ronald Reagan, Governor

State of California—Human Relations Agency
Department of Industrial Relations
Division of Industrial Safety
3460 Wilshire Boulevard, Los Angeles,
California 90005

August 30, 1971

Mr. Roger Arnebergh
Los Angeles City Attorney
Room 2101, City Hall
Los Angeles, California 90012

Dear Sir
This Division sets forth the following circumstances to wit:

Defendants:

Lockheed Shipbuilding and Construction Company
2929 16th Avenue SW
Seattle, Washington 98134
A. M. Folden, President

Lockheed Shipbuilding and Construction Company
2929 16th Avenue SW
Seattle, Washington 98134
R. N. Waters, Vice President

Lockheed Shipbuilding and Construction Company
2929 16th Avenue SW
Seattle, Washington 98134
W. E. McDanniel, Manager-Const. Division

Lockheed Shipbuilding and Construction Company
2929 16th Avenue SW
Seattle, Washington 98134
R. E. Hix, Manager-Construction Division

Lockheed Shipbuilding and Construction Company
12800 Fenton Avenue
Sylmar, California 91342
L. G. Savage, Project Manager

Lockheed Shipbuilding and Construction Company
12800 Fenton Avenue
Sylmar, California 91342
O. G. Ree, Project Engineer

Lockheed Shipbuilding and Construction Company
12800 Fenton Avenue
Sylmar, California 91342

Complainants:

George O. Denton
Safety Engineer—Construction
State of California
Department of Industrial Relations
Division of Industrial Safety
3460 Wilshire Boulevard, Room 910
Los Angeles, California 90010
Telephone: 381-3951

Wallace J. Zavattero
Safety Engineer—Construction
State of California
Department of Industrial Relations

Division of Industrial Safety
3460 Wilshire Boulevard, Room 910
Los Angeles, California 90010
Telephone: 381-3951

Date of Offense:

June 23, 1971 and June 24, 1971

Location:

San Fernando Tunnel Project
12800 Fenton Avenue
Sylmar, California 91342

Statement of Conditions: At the above location in the City of Los Angeles, the defendants, or some of them, on June 23rd and 24th, 1971 directed that a tunnel excavation be made. Said excavation was proceeding and defendants, or some of them, failed to provide the necessary safeguards so as to afford their employees and invitees a safe place of employment. Said defendants, or some of them, were in the process of directing said employees in said tunnel excavation work when an explosion took place that was the actual and proximate cause of death for sixteen (16) employees and one (1) inspector employed by the Metropolitan Water District of Southern California.

Names of workers killed in the accident:

1. Forrest E. Aldrich
2. William I. Ashe
3. Robert E. Ballow
4. Danny J. Blaylock
5. Jose R. Carrasco
6. William Carter
7. Ronald E. Demo
8. John P. Drobot

9. Mike Guitierrez
10. Gary A. Nichols
11. Russell M. Overstreet
12. Jonas V. Peters
13. William J. Snodgress
14. Alvin H. Spreen
15. Robert K. Stowers
16. Robert W. Warner
17. Louis L. Richardson (Inspector for M.W.D.).

Count No. 1: Labor Code 6400. It is alleged that the defendants committed an act and/or acts which constitute a misdemeanor; to wit: Violations of Section 6414 of the California Labor Code in that they failed to comply with the provisions of California Labor Code Section 6400 and the California Administrative Code, Title 8, Tunnel Safety Orders 8410, (a) (c), 8422 (a) (b), 8425 (a) (b) (c), 8431 (a) (c) (d) (e) by reason of their failure to furnish a safe place of employment for their employees.

Count No. 2: Labor Code 6401. It is alleged that the defendants committed an act and/or acts which constitute a misdemeanor; to wit: Violation of Section 6414 of the Labor Code in that they failed to comply with the provisions of Labor Code Section 6401 which states that every employer shall furnish and use safety devices and safeguards which are reasonably adequate to render such employment and place of employment safe.

Count No. 3: Labor Code 6402. It is alleged that the defendants committed an act and/or acts which constitute a misdemeanor; to wit: Violation of Section 6414 of the Labor Code in that they failed to comply with the provisions of Labor Code Section 6402 which

stipulates that no employer shall require or permit any employees to go or be in any employment or place of employment which is not safe.

Count No. 4: Labor Code 6403: It is alleged that the defendants committed an act and/or acts which constitute a misdemeanor; to wit: Violation of Section 6414 of the Labor Code in that they failed to comply with the provisions of Labor Code 6403 in that no employer shall fail or neglect: (a) To provide and use safety devices and safeguards. (b) To adopt and use methods and processes reasonably adequate to render the employment and place of employment safe. (c) To do every other thing reasonably necessary to protect the life and safety of employees.

Count No. 5: Labor Code 6404. It is alleged that the defendants committed an act and/or acts which constitute a misdemeanor; to wit: Violation of Section 6414 of the Labor Code in that they failed to comply with the provisions of Labor Code 6404 which states that no employer shall occupy or maintain any place of employment that is not safe.

Count No. 6: Labor Code 6416. It is alleged that the defendants through their gross negligence in failing to provide a safe employment and place of employment, caused the death of their employees (listed above) and should be punished by imprisonment in the county jail for not more than one year or by a fine of not less than one thousand dollars ($1000) nor more than five thousand dollars ($5000).

Facts: The following Tunnel Safety Orders were violated:

Tunnel Safety Order 8410. General. (a) Every reasonable precaution shall be taken to insure the

safety of the workmen in all cases, whether or not provided for in these orders. (c) No man shall be required to work in an unsafe place unless for the purpose of making it safe, and then only after proper precautions have been taken to protect him while doing such work.

Tunnel Safety Order 8422. Oxygen Breathing Apparatus. (a) At all tunnels where flammable or noxious gases are encountered or anticipated, there shall be provided and properly maintained permissible self-contained oxygen breathing apparatus, in number and type as the division so directs. A sufficient supply of replacement parts and regenerating material shall be maintained. Where there is more than one tunnel operated by the same employer as one project, only one group of five (5) sets of oxygen breathing apparatus will be required. Apparatus shall be kept in repair and ready for use at all times.

(b) Where the apparatus is required by the division there must be enough physically fit and trained men outside the tunnel to provide one or more crews of five (5) men within reach by telephone or other means and available for service at the tunnel within two hours. Training shall be given annually and shall be at least equivalent to that offered by the U. S. Bureau of Mines. These men shall be required to practice at least thirty (30) minutes a month in the use of the apparatus.

Tunnel Safety Order 8425. Dangerous or Poisonous Gases. (a) When the air in any part of a tunnel is known to contain or is suspected of containing an

explosive gas, it shall be tested by means of a permissible miner's safety lamp, or by other means acceptable to the Division of Industrial Safety before men are allowed to work therein. These tests shall be made by a man who is competent to make them. If the main return air in the tunnel contains more than one percent by volume of an explosive gas, any work therein shall be conducted with extreme care and steps shall be taken to improve ventilation. The tests shall then be made at least every four hours during the working shift and the Division of Industrial Safety notified of the condition.

(b) When two percent (2%) or more of an explosive gas or a poisonous or suffocating gas in concentrations dangerous to life is encountered, normal operations shall cease in those places, except that under competent direction, necessary steps may be taken to make the place safe. The Division of Industrial Safety shall be notified when such conditions are encountered.

(c) Before installing or using any electrical equipment in places containing methane gas or other explosive gases, the Division of Industrial Safety should be advised of the actual conditions. Such installations or operations must comply with existing Electrical Safety Orders and may be subject to specific orders to be issued by the division.

Tunnel Order 8431. Ventilation. (a) Fresh air shall be delivered in adequate quantities to all underground

work areas. The supply shall at least be sufficient to prevent dangerous or harmful accumulations of dust, fumes, vapors or gases, and shall not be less than 30 feet per minute in those tunnels where blasting or rock drilling is conducted, or where there are other conditions that are likely to produce dusts, fumes, vapors or gases in harmful quantities. The ventilation system shall be so arranged that the air flow can be reversed if a fire or some other emergency makes this advisable. (Also, see Order 8440)

(d) No man, unless he is wearing permissible self-contained oxygen breathing apparatus shall be permitted to work in a place where a flame safety lamp or a candle will not burn.

(e) Where flammable gas is encountered normal operations cannot proceed unless sufficient air is furnished to hold the percentage of flammable gas to not more than one per cent (1%) by volume in the return air of the tunnel. (See Order 8425)

Note: Copy of Tunnel Safety Orders is attached.

Exhibits: (Will be duplicated and forwarded under separate cover.)

Witnesses: (Testimony of witnesses will be forwarded under separate cover)

This Division, therefore, requests that a complaint of gross negligence be issued against subject employer.

Very truly yours

H. A. Crabtree
Senior Safety Engineer

/rp

Affidavit of Don H. Terry in Support of Motion Under P.C. 654.

In the Municipal Court of the Los Angeles Judicial District County of Los Angeles, State of California.

The People of the State of California, Plaintiff, v. Lockheed Shipbuilding and Construction Company, a corporation doing business in California, and Loren G. Savage, Otha G. Ree, Jr., Russell Van Guilder, Eugene Pedigo, Defendants. No. 413019.

AFFIDAVIT OF DON H. TERRY

State of California, County of Los Angeles—ss.

DON H. TERRY deposes and says:

That your affiant is an attorney licensed to practice law before all of the Courts of the State of California.

That on or about November 22, 1971, the office of the City Attorney for the City of Los Angeles, California, by and through Deputy City Attorney George D. Bane, caused to be filed a criminal complaint against Lockheed Shipbuilding and Construction Company and Otha G. Ree, Jr., being case number 402085 in the Municipal Court of the Los Angeles Judicial District, County of Los Angeles, State of California, charging Lockheed Shipbuilding and Construction Company and Otha G. Ree, Jr., with seven Counts of violating the provisions of the Labor Code of the State of California, and one Count charging a violation of Penal Code Section 135 (concealing evidence).

That prior to February 10, 1972, that matter proceeded to trial and trial was completed resulting in Lockheed Shipbuilding and Construction Company being convicted of violating Section 135 of the California State Penal Code, the rest of the Counts against

said defendant being either dismissed or the defendant being found not guilty thereof, and all Counts against Otha G. Ree Jr., being either dismissed or defendant being found not guilty thereof.

That in the first case filed against the defendants herein, number 402085, your affiant made a discovery motion in Division 59 of the Municipal Court of the Los Angeles Judicial District seeking, among other things, all photographs, signed or unsigned statements of witnesses, notes of investigating officers, recordings, engineer's reports, and official investigation reports of the explosion in the Sylmar tunnel which occurred on June 23, 1971. This discovery motion was granted.

On December 22, 1971, your affiant, pursuant to said discovery order, went to the office of the City Attorney where he met with Deputy City Attorney George D. Bane. In Mr. Bane's office on December 22, 1971, your affiant talked with Mr. Bane regarding the discovery motion and the facts relating to the explosion at the Sylmar tunnel and events that occurred subsequent thereto.

Mr. Bane related to your affiant, among other things, that Mr. Bane had been assigned to the "Lockheed case" for three months prior to December 22, 1971. That during this three months period he had made visits to the Sylmar tunnel, conferred at length and in great detail with witnesses pertaining to the cause of the tunnel explosion, the condition of the tunnel prior to the explosion and at the time of the explosion, and had complied a complete and thorough file on this tunnel explosion case.

Mr. Bane directed my attention to a stack of documents on his desk stating that those were all of the re-

ports of the investigation and statements of witnesses and I could have copied any of the documents I desired.

I spent approximately four and one half hours in Mr. Bane's office that afternoon together with a man who made photocopies of the documents.

Among the documents photocopied were statements given by Henry McIntyre, Ralph Brissette, Arvid Rasmussen, Wallace Zavattero and George Denton.

There were also present in the file orders and letters made by the State Division of Industrial Safety pertaining to the Sylmar tunnel both before and after the explosion on June 24, 1971.

Deputy City Attorney George D. Bane told your affiant that he had been assigned to this case to gather information for the prosecution of Lockheed Shipbuilding and Construction Company, and others, pertaining to the deaths that were caused by the explosion. That he had accumulated so much evidence against Lockheed Shipbuilding Company and Otha G. Ree, Jr., that there was no way they could "win" the case, referring to Lockheed and Ree.

Contained among the hundreds of documents on Mr. Bane's desk were statements by Wallace Zavattero pertaining to his inspections of the Sylmar tunnel, *including June 23, 1971,* and copies of the orders he issued both before and after the tunnel explosion. Included in the hundreds of exhibits were photographs of the deceased parties together with their identification.

There was also a statement from Henry McIntyre which said in substance that on June 22, 1971 he was employed by Lockheed and that Savage and Ree were his supervisors. That Van Guilder was his immediate

supervisor. That he worked in the Sylmar tunnel on that date and operated the mining machine during the shift. That five hours before his shift ended he began to smell a strong odor of crude oil and gasoline. That the odor got stronger. That the gas burned his eyes, nose and throat. That during the last hour the odor and gas made him sick. That he informed Van Guilder of the conditions and that other workers complained. That during the last hour of the shift he had to leave the machine to go and get fresh air. That he knew about the oil because he had worked in the oil fields and could recognize the smell.

Included in the numerous documents was the statement of Arvid Rasmussen to the effect that on June 23, 1971, he was employed by Lockheed and that his supervisors were Savage and Ree. That he was required to work in the tunnel and during the swing shift of June 23, 1971, he was operating an explosion meter testing for gasses. He tells of his tests made during that shift and the readings and of his informing Mr. Savage of the high readings. That there was a strong smell of crude oil in the tunnel and it was burning the eyes and throats of the workers. He tells, in this statement, of a minor explosion occurring earlier and that the entire tunnel, expecially along the heading, smelled of a strong gasoline and crude oil odor.

Included among the many documents is the statement of Ralph Brissette that he was employed by Lockheed as a brakeman in the tunnel. That on the evening of June 21, 1971, and the morning of June 23, 1971, Savage was present in the tunnel. He details in his statement the explosive meter readings registered from 1 to 19% and of the ignition sources that were present and the smell of gas.

Each of the statements that I saw in Mr. Bane's office was in substance the same as those attached to the complaint in the instant case, Case Number 413019.

In addition to the statements of these witnesses there were statements of investigators, photographs, copies of orders from the Division of Industrial Safety, daily logs of workmen and the like.

Your affiant is informed and believes, and upon such information and belief avers that George Denton and Wallace Zavattero, the signators of the complaint, case number 413019, are the same persons who signed the prior complaint in Case Number 402085. That Arvid Rasmussen, listed as a witness in Case No. 402085, to which a statement is attached is the same Arvid Rasmussen who is listed as a witness in the present case, Case Number 413019, to which a summary of his testimony is attached.

Your affiant is informed and believes, and upon such information and belief avers, that George D. Bane, Deputy City Attorney, had in his file at least thirty days prior to November 22, 1971, the statements of each of the above named witnesses and sufficient information upon which to base and file a complaint identical to the one here filed in Case Number 413019 at the time he caused to be filed a misdemeanor complaint in Case Number 402085.

I certify and declare under penalty of perjury the foregoing is true and correct.

Executed at Pasadena, California, this 14th day of April, 1972.

DON H. TERRY